



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. CASE NO. 81 OF 2009(OS)**

**USHIRIKA REAL ESTATE DEVELOPERS LTD.....APPLICANT**

**VERSUS**

**THE PERSONAL REPRESENTATIVE OF THE ESTATE OF**

**CHUNILAL MADAN (DECEASED).....1<sup>ST</sup> RESPONDENT**

**HOMI DOSSABHAI-DRIVER.....2<sup>ND</sup> RESPONDENT**

**HIRJI VIRPAL SHAH.....3<sup>RD</sup> RESPONDENT**

**BALDEV SAHAI MOHINDRA.....4<sup>TH</sup> RESPONDENT**

**COMMISSIONER OF LANDS.....5<sup>TH</sup> RESPONDENT**

**MUGO MWANGI, WANJOHI GITHINJI, MUSYOKA GATHURI t/a**

**USHIRIKA COMPANY.....INTERESTED PARTIES**

**RULING**

The Application for the court's determination is the Notice of Motion dated 17<sup>th</sup> September 2014 brought under section 3A of the Civil Procedure Act, Order 1 Rule 3 and 8, Order 5 Rule 17, Order 10 Rule 11 and Order 40 Rules 1 & 2 of the Civil Procedure Rules, 2010 seeking for orders that :-

1. That Mugo Mwangi, Wanjohi Githinji and Musyoka Gathuri t/a Ushirika Company be joined in the suit as interested parties.
2. That the Applicant by itself, its servants and or agents be restrained by way of injunction from wasting, alienating, selling, offering for sale, charging, subdividing, evicting or interfering in whatsoever manner with the property known as L.R. No. 36/V/8A situated in Mathare (hereinafter referred to as the "suit property") pending the hearing and determination of this suit.
3. That there be a stay of execution of the Judgment made on 26<sup>th</sup> October 2011 and all the

- consequential orders pending the inter parties hearing.
4. Spent.
  5. That the Judgment and consequential orders made therein be set aside or be reviewed and varied and substituted with new orders on such terms as the Honourable Court may deem fair and just.
  6. That an order be issued directing the 5<sup>th</sup> Respondent and or his successor in law to revoke, nullify and cancel any title, grant or lease issued to the Applicant, Ushirika Real Estate Company Limited, in respect of the suit property.
  7. That the interested parties be granted leave to file response to the amended Originating Summons dated 25<sup>th</sup> June 2009 and the amended Originating summons be heard de novo.

This Application is premised on the grounds stated on the face of it together with the Supporting Affidavit of Mugo Mwangi, who is one of the interested parties, sworn on 17<sup>th</sup> September 2014 in which he averred that the Interested Parties were the three surviving registered members of Ushirika Company. He averred that in March 1968, he together with his friends Wanjohi Githinji, Wanjiku Thogo, Musyoka Gathuri, Esther Nathani, Njeri Njuguna, Bitris Nyakio Mwathiya and Grace Nyambura Mutira trading as Ushirika Company purchased the suit property from the 1<sup>st</sup> to 4<sup>th</sup> Respondents who were the joint registered owners. He averred further that they paid the Respondents the entire purchase price of Kshs. 70,000/= in full and subsequently took possession of the suit property while awaiting the transfer and issuance of title. He stated further that later in 1984, they engaged the firm of Benson Mugo Mukunya to finalize the transaction. He averred that the said Benson Mugo Mukunya prepared the conveyance but the 3<sup>rd</sup> Respondent, who resided in Mombasa, did not execute it because the said conveyance and the original title to the suit property inadvertently got lost and despite diligent search, the said documents could not be traced. He further stated that attempts to have another set of conveyance prepared had been complicated by the fact that some of the Respondents had since died and others gone out of the country and their whereabouts unknown. He further averred that the interested parties had been paying all the land rates in respect of the suit property but were shocked to discover that ownership thereof had changed from 1<sup>st</sup> - 4<sup>th</sup> Respondents as had always been to the Applicant, Ushirika Real Estate Developers Limited, in the year 2014. He further stated that the interested parties were not aware of this suit until the time they were paying the land rates and upon investigating the Applicant, they established that it was registered on 13<sup>th</sup> July 2007 by one James Njenga Mutemi, a son of the late Wanjiku Thogo who was the treasurer of Ushirika Company. He stated that the Applicant alleges to have purchased the suit property from the 1<sup>st</sup> to 4<sup>th</sup> Respondents after entering into a formal sale agreement in March 1968 while it was registered in 2007. He added that a keen perusal of the sale agreement showed that the agreement was not a genuine document for the reasons that the Applicant was not in existence at the time of executing the agreement in 1968, the sale agreement is signed by the same person twice instead of by two directors, the sale agreement is not witnessed and the signatures have not been attested to. He further averred that the Applicant must have taken advantage of their initial agreement and other documents and correspondences relating to the suit property that were being held by his late mother Wanjiku Thogo to manipulate the records and to purport to be a member of Ushirika Company. He further averred that Ushirika Company purchased the suit property from the 1<sup>st</sup> to 4<sup>th</sup> Respondents in 1968, took possession, subdivided part of the land in 1985 and shared it among eight (8) members including Wanjiku Thogo, Ester Nathan, Njeri Njuguna, Bitris Nyakio Mathia and Grace Nyambura Mutira. He added that they have developed their respective portions by building permanent and semi-permanent residential and rental houses and some have been sold to third parties. He stated further that it is apparent that the Judgment, decree and subsequent orders in this matter were obtained through deceit, misrepresentation, forgery of documents and concealment of material facts from the court by the Applicant who is now in the process of executing the orders by having himself registered as the sole owner of the entire land and unless restrained by an order of this court he has threatened to evict, subdivide and sell part of the suit property to third parties and the interested parties and their families risk to be rendered destitute and stand to suffer irreparable loss. Further, he sought leave of the court to serve by way of substituted service based on his honest belief that they are not likely to trace the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondent and or their personal representatives as their whereabouts and or the identity of their personal representative or next of kin is unknown and due to the nature of the Application and the subject matter of the suit the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents and or their personal representatives having sold and surrendered the suit property to the interested parties in

1968 may no longer have any interest in the matter. In the circumstances, he stated that it was only fair and just that an injunction be issued to conserve the suit property and the Court orders made herein be set aside and or reviewed as prayed and the execution thereof be stayed and in the event any title had been issued to the Applicant the same be revoked as it had fraudulently been acquired.

This Application is contested. The Applicant filed Grounds of Opposition, a Replying Affidavit and a Supplementary Affidavit. He averred that the interested parties company is not registered therefore the sale agreement between the interested parties and 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup>, and 4<sup>th</sup> Respondents is null and void. He averred that he filed this matter way back in 2009 after pursuing the issue of ownership of the suit property since the year 1968 when the same was legally bought by himself with the assistance of his mother from the late Chief Justice Chunilal Madan and others. He further stated that after discovering that the original transfer deed of the suit property could not be traced to be executed by one of the sellers, he moved to court praying for the orders of the Deputy Registrar High Court to sign on behalf of the Respondents. He also stated that the records of the suit property at the City Council indicated that the land belonged to the late C. Madan and others until the year 2013 when the records were changed to reflect the Applicant as the registered owner.

The 3<sup>rd</sup> Respondent also filed a Replying affidavit on 9<sup>th</sup> February 2015. He stated that he together with the 1<sup>st</sup> 2<sup>nd</sup> and 4<sup>th</sup> Respondent sold the suit property to the interested parties and executed a sale agreement. He further averred that pursuant to that sale agreement, the Respondents were paid Ksh 70,000/= in installments being the entire purchase price and that after the payment the interested parties took possession of the suit property. He further averred that the conveyance documents in respect of the suit property got lost while in the process of seeking execution by the Respondents. He contested the sale agreement provided by the Applicant stating that his signature was a forgery and that the Applicant was incorporated in the year 2007 and as such was not in existence in the year 1968. He confirmed that he sold the suit property to the interested parties and never dealt with the Applicant. He added that he believes that the Applicant must have obtained the order from the court through deceit, misrepresentation, forgery of documents and concealment of material facts from the court and it is in the interest of justice that the same be reversed or set aside and ownership of the suit property be restored to the interested parties. He added that an injunction should be issued to conserve the suit property.

The interested parties filed their written submissions wherein they submitted that they have established a prima facie case against the Applicant and that they will suffer irreparable loss if the suit property is not preserved. They further submitted that the balance of convenience tilts in their favour. They further submitted that the Applicant approached the court with inequity and misled the court to obtain orders therefore the said orders should be stayed and reviewed on the strength that they were obtained by fraud and deceit on the part of the Applicant. The Applicant and Respondents did not file their written submissions.

I have considered the pleadings, the written submissions and the authorities cited by the parties herein. The issue for this courts determination is whether the interested parties have made out a case to deserve the reliefs sought in their Application. The reliefs sought are:

1. That the Judgment and subsequent orders of this court be set aside
2. That an order of injunction be granted against the Applicant.
3. That the interested parties be enjoined to this suit.
4. Leave be granted to the interested parties to file response to the amended Originating Summons dated 25<sup>th</sup> June 2009 and the amended Originating summons be heard de novo.

The issue for the court to determine is whether the Applicant has demonstrated that they have any interest that warrants them to be enjoined to these proceedings as interested parties at this stage. The applicants have moved this court under the provisions of **Order 1 Rule 3 and 8 of the Civil Procedure Rules, 2010**. This rule grants this court power to enjoin a party to a suit so that the issues in dispute may be properly and effectively adjudicated. Therefore, in my view, the jurisdiction of this court under the above rule can only be invoked where the court is of the opinion that it would be necessary to enjoin a party to the suit for the effective determination of the matters in dispute and to avoid multiplicity of suits. **It is a**

fundamental consideration that before a person can be enjoined as party, it must be established that the party has high interest in the case. In addition, it must be clearly demonstrated that the orders sought in the main suit would directly affect the party seeking to be added. These considerations have been amplified by the Supreme Court of Uganda in the case of the *Deported Asians Property Custodian Board v. Jaffer Brothers Ltd* [1999] I.E.A 55, where the court held that,

***“...for a party to be joined on ground that his presence is necessary for the effective and complete settlement of all questions involved in the suit, it is necessary to show either that the orders sought would legally affect the interest of that person and that it is desirable to have that person joined to avoid multiplicity of suit, or that the defendant could not effectually set up a desired defence unless that person was joined or an order made that would bind that other person.”***

In the instant case, the interested parties have laid claim of ownership on the suit property and alleged that the Applicant had misrepresented facts, used deceit and fraud before the court with an aim of unjustly enriching himself by having this suit property transferred to him by way of adverse possession. The interested parties have in their affidavit shown that the Applicant was a son to one of the official members of Ushirika Company and was in possession of the documents that had been used in the purchase of the suit property from the Respondents. The interested parties have also stated that since the Applicant was registered in July 2007 it would not be possible for the Applicant to have purchased the suit property in 1968. The 3<sup>rd</sup> Respondent who was one of the vendors of the suit property also disputed the signature appended on the sale agreement exhibited by the Applicant thereby putting the sale agreement relied by the applicant into question that needs to be interrogated by the court after hearing all the parties. In the premises and in the interest of fairness and justice, the court will grant leave to the proposed interested parties to be enjoined in these proceedings and to participate in the hearing of the Applicant's claim. In that regard the now enjoined interested parties has leave of 14 days from the date of this ruling to file any response to the amended Originating Summons dated 25<sup>th</sup> June 2009 and I do order that the amended Originating summons be heard *de novo*.

The interested parties want this court to set aside the judgment delivered on 26<sup>th</sup> October 2011 and all the consequential orders. This must be exercised judiciously by the court. In *CMC Holdings Limited vs. Nzioki* [2004] 1 KLR 173 the Court of Appeal held that,

***“In an application for setting aside ex parte judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously..... In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error.”***

Normally, for a court to set aside judgment there has to be a draft defence/Replying affidavit on record. In this case, the interested parties have explained to this court that they were not aware of this suit until when they attempted to pay their rates at the City Council of Nairobi when they discovered that ownership of the suit property had changed hands. It is not the intention of the court to shut out a litigant from defending or persecuting his claim. The interested parties have claimed in their affidavit that they are the actual owners of the suit property having purchased the same from the Respondents in 1968 and explained that the reason why they could not complete transfer of the property from the Respondents to their name was because the transfer documents were misplaced. They have further explained the nexus between the Applicant and the interested parties and stated that the Applicant was a son to one of their members and by virtue of being an official she was in possession of the documents that could have been used by the Applicant to effect the transfer of the suit property into its name. The interested parties have alleged fraud and deceit on the part of the Applicant in obtaining judgment from this court. This claim has been supported by the 3<sup>rd</sup> Respondent in his replying affidavit. The Applicant has however not rebutted this claim and it is my finding that to be fair to the parties herein the judgment dated 26<sup>th</sup> October 2011 and all consequential orders are hereby set aside so that parties can have the opportunity to prosecute and defend their claim before the court afresh.

The interested parties have also sought injunctive orders against the Applicant in respect to the suit property. The principles for the granting of injunction are well settled by the time honoured decision of **Giella Vs Cassman Brown & Company Limited [1973] E.A. 358**. When a litigant approaches the court for an injunction, he must rise to the threshold for grant of interlocutory relief set clearly. He must demonstrate a prima facie case with a probability of success; secondly, he must show that he stands to suffer irreparable harm not compensable in damages; and lastly, if in doubt, the court must weigh the balance of convenience.

The interested parties have laid claim on the suit property. They have gone to great length to show how they acquired it and that they are currently in possession and have developed the suit property. The Applicant has disputed the interested parties claim and added that he actually purchased the suit property and since title has not been passed to him by the Respondents he has made a claim of adverse possession. The determination of the legal owner is the proper subject of trial by the court and the only way to establish the veracity of the subject matter is on tested evidence after the parties have been cross examined on their statements and documents. Since the court has set aside the judgment it had delivered earlier on this matter, I will grant the interim injunction requested by the interested parties pending the hearing and determination of this suit.

In light of the foregoing, this Application is hereby allowed. Costs shall be in the cause.

**DELIVERED AND SIGNED AT NAIROBI THIS 10<sup>TH</sup> DAY OF JULY 2015.**

**MARY M. GITUMBI**

**JUDGE**